(2)

No. 90-347

In The

Supreme Court of the United States

October Term, 1990

FRED DANIEL VAN DYKEN,

Petitioner,

v.

THE STATE OF MONTANA,

Respondent.

On Petition For A Writ Of Certiorari To The Montana Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a mistrial is declared for manifest necessity by reason of a hung jury, does the Double Jeopardy Clause of the United States Constitution affect the procedure on retrial?

2. Does the Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantee a criminal defendant the right to a "failure-to-agree" jury instruction on consideration of lesser included offenses when the jury instructions given require the jury to consider the lesser offense simultaneously with the greater?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the constitutional provisions included by petitioner, the following state statutes are involved in this case:

Mont. Code Ann. § 45-5-101(1) (1983):

> A person commits the offense of criminal homicide if he purposely, knowingly, or negligently causes the death of another human being.

Mont. Code Ann. § 45-5-102(1)(a) (1983):

> [C]riminal homicide constitutes deliberate homicide if: (a) it is committed purposely or knowingly[.]

Mont. Code Ann. § 45-5-103(1) (1983):

> Criminal homicide constitutes mitigated deliberate homicide when a homicide which would otherwise be deliberate homicide is committed under the influence of extreme mental or emotional stress for which there is reasonable explanation or excuse.

STATEMENT OF THE CASE[1]

Petitioner was charged by information in Missoula County, Montana, on December 11, 1984, with deliberate

[1] Respondent takes exception to petitioner's statement of the case insofar as it includes the assertion of many facts which are irrelevant to the issues raised. In particular, respondent submits that consideration and comparison of particular items of evidence presented at each trial and of the trial court's rulings at each trial as to instructions on mental state and as to

(Continued on following page)

homicide arising out of the shooting death of Missoula County Deputy Sheriff Allen Kimery on December 6, 1984. The case was assigned to State District Judge Thomas A. Olson and tried before a jury in Livingston, Montana, commencing September 9, 1985. When the jury was unable to reach a verdict, the trial court declared a mistrial and ordered the petitioner remanded to the custody of the sheriff pending retrial. App. 1-2.

Following the mistrial, both parties filed further pretrial motions and the case was again set for trial. On June 4, 1986, the trial court ruled on both parties' pretrial motions. *See* Petition for Cert. at 22a. The State of Montana took an interlocutory appeal from the district court's order and petitioner sought review by petitioning the state supreme court for a writ of supervisory control. The two proceedings were consolidated and a joint briefing schedule was set. Thereafter, the Montana Supreme Court dismissed both the appeal of the State and the petitioner's application for supervisory control. App. 3. The court found that the issues raised were not appealable, but additionally ruled that the declaration of a mistrial under the circumstances of this case did not constitute a bar to retrial on the grounds of former jeopardy. App. 8-9.

(Continued from previous page)

presentation of expert testimony are immaterial to resolution of the narrow legal questions on which petitioner seeks review. Further, petitioner has referred to a hearing conducted April 27, 1987, and attached portions of the transcript thereof, which was not made a part of the record on appeal before the Montana Supreme Court. *See* Petition for Cert. at 7, 83a.

Petitioner moved for rehearing on the double jeopardy issue, which was denied. App. 11.[2]

Following dismissal of the appeals, the case eventually was assigned to State District Judge James B. Wheelis. Pretrial motions were filed and briefed, and trial was set for June 8, 1987. Prior to trial, the trial court issued an opinion and order resolving both parties' pretrial motions. *See* Petition for Cert. at 29a. Among other rulings, the court rejected petitioner's argument that double jeopardy barred retrial on the ground that the State would gain an unfair tactical advantage in trying the case a second time.

Trial commenced on June 8, 1987, in Helena, Montana, and testimony concluded on June 25, 1987.[3] The

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[2] Petitioner states that in denying both parties' requests for interlocutory review the Montana court found all issues to be nonappealable and dismissed for lack of jurisdiction. (Petition for Cert. at 6.) In fact, the Montana Supreme Court ruled on the merits of petitioner's argument that double jeopardy barred his retrial. When petitioner sought rehearing on this ground, the high court clarified its prior decision, ruling that the declaration of a mistrial on the ground of a deadlocked jury did not constitute a bar to retrial and that petitioner was not impliedly acquitted of deliberate homicide. App. 13.

[3] While petitioner correctly states that the trial court denied his request during the second trial for a "failure-to-agree" instruction as to consideration of lesser included offenses (see Petition for Cert. at 8), two additional facts must be noted. First, the trial court indicated that it would be willing to give the requested instruction in the event the jury became deadlocked. (Petition for Cert. at 50a.) Second, the trial court instructed the jury that, in order to convict petitioner of deliberate homicide, it had to find that, at the time the crime was committed, petitioner was not suffering from extreme mental or emotional stress for which there was reasonable explanation or excuse. App. 15.

following day the jury returned its verdict, finding petitioner guilty of deliberate homicide. (Trial transcript at 1927-30, App. 17.) On August 28, 1987, petitioner was sentenced to life imprisonment in the Montana State Prison without possibility of parole. App. 21.

Petitioner timely appealed his conviction to the Supreme Court of Montana, raising a number of grounds, including both issues presented in the instant petition. The court rejected petitioner's appeal on each ground. *State of Montana v. Van Dyken*, 791 P.2d 1350 (Mont. 1990). *See* Petition for Cert. at 1a. Petitioner filed a timely request for rehearing (Petition for Cert. at 42a), to which the State responded. App. 24. On May 25, 1990, the Montana Supreme Court denied the petition for rehearing. *See* Petition for Cert. at 41a.

SUMMARY OF THE ARGUMENT

Neither of the issues presented by petitioner raises a significant constitutional or federal question worthy of consideration by this Court. The decision of the Montana Supreme Court neither conflicts with decisions of this Court or of any lower court nor determines an important, unsettled question of federal law. Petitioner's double jeopardy argument ignores fundamental principles of double jeopardy analysis, including the distinction between a mistrial declared for "manifest necessity" and a mistrial declared because of misconduct by the prosecution. With respect to the jury instructions regarding consideration of lesser included offenses, petitioner

overlooks the critical fact that the trial court's instructions required the jury to consider both the greater and lesser offenses simultaneously. In view of the particular circumstances of this case, the question is not appropriate for review. Finally, although there is a divergence of authority as to which instruction should be given, a "failure-to-agree" instruction is not constitutionally required.

ARGUMENT

I. THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION DOES NOT IMPLICATE THE MANNER IN WHICH A CASE MAY BE RETRIED WHERE A MISTRIAL IS DECLARED FOR MANIFEST NECESSITY.

Petitioner asserts that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution imposes constraints on the manner in which the State may proceed on retrial when a mistrial has been declared by reason of a deadlocked jury. In other words, while he has no quarrel with the legitimacy of the second trial, petitioner argues that double jeopardy principles prohibit the use of "certain techniques" by the State to obtain a conviction on retrial. Petition for Cert. at 10-11. Petitioner's argument evidences a fundamental misunderstanding of the letter and purpose of the Double Jeopardy Clause, and fails to present a significant federal question for consideration by this Court.

The Double Jeopardy Clause establishes three distinct protections: (1) against a second prosecution for the same offense after acquittal; (2) against a second prosecution for the same offense after conviction; and (3) against

multiple punishments for the same offense. *Grady v. Corbin*, 110 S. Ct. 2084, 2090, 58 U.S.L.W. 4599, 4601 (1990) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)). "Because jeopardy attaches before the judgment becomes final, the constitutional protection also embraces the defendant's 'valued right to have his trial completed by a particular tribunal.' " *Arizona v. Washington*, 434 U.S. 497, 503 (1978) (footnote omitted).

On occasion, this valued right must yield to the public interest "in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury." *Id.* at 505. Thus, the law permits the grant of a mistrial without bar to retrial where manifest necessity exists for terminating the trial before the jury has rendered its verdict. *Id.* "[I]t has become well-established law that the paradigm example of 'manifest necessity' sufficient to permit a second trial of a defendant in a criminal case occurs when the jury cannot reach a verdict." *Arnold v. McCarthy*, 566 F.2d 1377, 1386 (9th Cir. 1978). *See also Oregon v. Kennedy*, 456 U.S. 667, 672 (1982) (hung jury remains the prototypical example of manifest necessity standard). On the other hand, jeopardy will terminate where the prosecutor seeks a mistrial "in order to buttress weaknesses in his evidence." *Arizona v. Washington*, 434 U.S. at 507.

The fundamental policy behind the prohibition against double jeopardy is that

> the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live

> in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957). Thus, double jeopardy bars retrial where prosecutorial misconduct forces a defendant to move for a mistrial which operates as a "post-jeopardy continuance to allow the prosecution an opportunity to strengthen its case." *Illinois v. Somerville*, 410 U.S. 458, 469 (1973). *See also Downum v. United States*, 372 U.S. 734, 736 (1963); *Oregon v. Kennedy*, 456 U.S. at 675-76. Recently, this Court again recognized the danger that multiple prosecutions "give the State an opportunity to rehearse its presentation of proof, thus increasing the risk of an erroneous conviction for one or more of the offenses charged." *Grady v. Corbin*, 110 S. Ct. at 2091-92, 58 U.S.L.W. at 4601.

Underlying the double jeopardy analysis in each of these cases is the focus on the reason for subjecting the defendant to successive prosecutions. In determining whether double jeopardy bars a defendant's conviction, the Court looks to the basis upon which retrial is sought and to which party is responsible. Thus, retrial is permissible where the defendant successfully attacks his conviction on the basis of error in the proceedings, *United States v. Tateo*, 377 U.S. 463, 465, 467-68 (1964); where a mistrial is declared for "manifest necessity," *Wade v. Hunter*, 336 U.S. 684, 688-89 (1949); where a defendant requests a mistrial in the absence of prosecutorial or judicial overreaching, *United States v. Dinitz*, 424 U.S. 600 (1976); and where an indictment is dismissed at a defendant's request in circumstances which are the functional equivalent of a

mistrial, *United States v. Scott*, 437 U.S. 82 (1978); *Lee v. United States*, 432 U.S. 23 (1977).

Petitioner's argument relies upon the recognized prohibition against retrial where the prosecution "goad[s] the defendant into moving for a mistrial" for the purpose of resolving weaknesses in its evidence. *Oregon v. Kennedy*, 456 U.S. at 676. This line of cases simply is inapplicable where a mistrial is declared as the result of a hung jury and not as the result of prosecutorial misconduct intended to provoke a mistrial. *United States v. Gooday*, 714 F.2d 80, 83 (9th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984). In short, double jeopardy analysis is directed to the determination whether retrial is permissible. Once that determination has been made, the inquiry is at an end. *Oregon v. Kennedy*, 456 U.S. at 679. The Double Jeopardy Clause does not affect the procedure upon retrial.

Petitioner admits that his novel question has been "rarely asked." Petition for Cert. at 11. Indeed, he cites no authority supporting his position. Respondent submits that the reason for the dearth of authority on the issue is evident. If the petitioner's argument is to be accepted, the hands of both parties on retrial would be intractably tied. Short of following the first trial transcript verbatim, the parties inevitably would run afoul of the rule envisioned by petitioner. Though he concedes that a second trial could never be an exact replica of the first, petitioner apparently seeks a rule that would, at a minimum, prohibit the parties from seeking legal rulings between trials. Petition for Cert. at 19. This concept is contrary to the well-settled principle that when the first trial is a nullity, "the court in the new trial tries 'the case as if it were

being tried for the first time . . . , as if there had been no prior trial.' " *United States v. Akers*, 702 F.2d 1145, 1148 (D.C. Cir. 1982).

In summary, respondent submits that the argument raised by petitioner is without support in any of this Court's prior decisions construing the Double Jeopardy Clause and would be impossible to implement. Petitioner essentially seeks a rule that would prohibit the parties from changing their trial strategy in any way if retrial was ordered for a legitimate reason. Such a far-reaching interpretation of double jeopardy protection is unfounded; once a determination is made that retrial is permissible, the double jeopardy inquiry is terminated and the defendant may be tried anew. The procedure on retrial simply is not affected by the Double Jeopardy Clause.

II. THIS CASE DOES NOT PRESENT A PROPER VEHICLE FOR THE COURT TO DETERMINE WHETHER A DEFENDANT IS ENTITLED, AS A MATTER OF DUE PROCESS, TO A "FAILURE-TO-AGREE" TRANSITION INSTRUCTION.

Citing a split of authority among both state and federal courts, petitioner asks the Court to accept jurisdiction of this case to determine whether a trial court must instruct the jury that it may deliberate on a lesser offense if it cannot agree on the greater. Petition for Cert. at 21. Consistent with state law, the trial court in this case instructed the jury that it must consider and reach a verdict on the charge of deliberate homicide first, and could only consider the lesser offense of mitigated deliberate homicide if it acquitted the petitioner of the greater

offense. Petition for Cert. at 46a. The Supreme Court of Montana upheld the instruction, observing that " 'it is the duty of the jury not to reach compromise verdicts based on sympathy for the defendant or to appease holdouts, but to render a just verdict by applying the facts it finds to the law [with which] it is charged.' " *State v. Van Dyken*, 791 P.2d at 1361, Petition for Cert. at 18a-19a (quoting *People v. Boettcher*, 69 N.Y.2d 174, 513 N.Y.S.2d 83, 87, 505 N.E.2d 594, 597-98 (1987)).

There are two primary reasons for the Court to decline to address this question in the instant case. First, before this Court will overturn a state conviction on the basis of a jury instruction, "it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." *Cupp v. Naughten*, 414 U.S. 141, 146 (1973). Although the United States Circuit Courts of Appeals are not in agreement as to the propriety of giving an "acquittal-first" instruction over the objection of the defendant,[4] none of those courts has held that it is

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[4] *Compare United States v. Moccia*, 681 F.2d 61, 64 (1st Cir. 1982) (recognizing "well-established" rule that jury is to consider lesser offenses only after determining verdict on primary charge), and *Pharr v. Israel*, 629 F.2d 1278, 1281-82 (7th Cir.), *cert. denied*, 449 U.S. 1088 (1980) ("acquittal-first" instruction does not deprive accused of due process of law or of right to trial by jury), *with United States v. Tsanas*, 572 F.2d 340, 346 (2d Cir.), *cert. denied*, 435 U.S. 995 (1978) ("failure-to-agree" instruction should be given when requested by defendant), and *United States v. Jackson*, 726 F.2d 1466, 1469 (9th Cir. 1984) (same).

a violation of the defendant's right to due process to give such an instruction. *See, e.g., United States v. Jackson*, 726 F.2d at 1469 (either formulation may be employed if the defendant expresses no choice); *United States v. Torres*, 901 F.2d 205, 241 (2d Cir. 1990) (neither charge is wrong as a matter of law).

Even the state cases cited by petitioner have not held expressly that an "acquittal-first" instruction violates due process. *See State v. Thomas*, 40 Ohio St. 3d 213, 533 N.E.2d 286, 291-92 (1988), *cert. denied*, 110 S. Ct. 89 (1989); *State v. Duff*, 150 Vt. 329, 554 A.2d 214, 218 (1988). Indeed, this Court has never held that a defendant is entitled to any lesser included offense instruction as a matter of due process. *Beck v. Alabama*, 447 U.S. 625, 637 (1980). Here, the trial court complied with minimum constitutional safeguards by giving the jury the "third option" of convicting on a lesser included offense. *Id.* The petitioner's right to due process was not violated.

Second, the trial court in the instant case exercised a greater amount of caution than was required by instructing the jury to consider mitigation as part of the elements of deliberate homicide. *See* App. 15. Under Montana law, deliberate homicide is committed if the defendant purposely or knowingly causes the death of another human being. Mont. Code Ann. §§ 45-5-101(1), 45-5-102(1)(a) (1983). The defendant is guilty of the lesser included offense of mitigated deliberate homicide if he purposely or knowingly causes the death of another human being but does so "under the influence of extreme mental or emotional stress for which there is reasonable explanation or excuse." Mont. Code Ann. § 45-5-103(1) (1983).

Here, the trial court instructed the jury that it must find, in order to convict the petitioner of deliberate homicide, not only that he purposely or knowingly caused the death of the victim, but also "that when the Defendant did so, he was not suffering from extreme mental or emotional stress for which there is reasonable explanation or excuse." App. 15. By giving this instruction, the trial court obviated the need for petitioner's "failure-to-agree" instruction, in effect mandating the jury to find deliberate homicide only after concluding no extreme mental or emotional stress was present.

Because the State was required to prove absence of extreme mental or emotional stress,[5] the jury was compelled to consider the essential ingredient of the lesser included offense and petitioner can claim no prejudice from the district court's refusal to give his tendered instruction.

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[5] Although neither the statute nor relevant case law places the burden on the prosecution to prove the absence of mitigation, *see, e.g., State v. Gratzer*, 209 Mont. 308, 318, 682 P.2d 141, 146 (1984); *State v. Ballenger*, 227 Mont. 308, 313, 738 P.2d 1291, 1295 (1987), the trial court squarely placed the burden on the State "to exclude mitigation beyond a reasonable doubt." App. 15.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

(p. 36) THE COURT: Let the record show the Defendant is personally present with counsel, the jury is present. Would the foreperson please stand? Mr. Keough, you have handed me another note, through the Bailiff. I will ask you at this time whether or not you have reached a verdict in this case.

THE FOREPERSON: No, we haven't, your Honor.

THE COURT: Mr. Keough, based upon what you've told me in this note, which says you're unable to reach a unanimous decision, do you think that further deliberation of this jury would produce any result?

THE FOREPERSON: No, I don't, your Honor.

THE COURT: I will take your word for it since you know the jurors better than I.

Ladies and gentlemen, I'm about to dismiss you in this matter and declare that no verdict has been reached by this particular jury. I will tell you that you're likely to be or it is possible that persons can come up to you and talk to you about what happened in the jury room. This being a free country, you have the right to decline to talk about it or you have the right to exercise your First Amendment rights and talk about it. I would caution you about protecting the confidentiality of your fellow jurors. I would not think it would be right to talk about how they acted or what they said. You are (p. 37) free to express your own particular opinions if you choose to do so. I thank you for being so conscientious and it's regretful that a verdict was not reached and other than that, I will not speak. You may step down.

Let the record show that the jury has been dismissed; that the Defendant is remanded to the custody of the Missoula County Sheriff for a retrial in this matter and to be held by them pending a retrial. I will consult my calendar and give the parties a cooling off period and I will then meet with the attorneys to schedule a retrial of this matter.

* * *

APPENDIX B

IN THE SUPREME COURT OF THE
STATE OF MONTANA

No. 86-279

STATE OF MONTANA,

Plaintiff/Appellant,

vs.

FRED DANIEL VAN DYKEN,

Defendant/Respondent
and Cross-Appellant.

STATE ex rel. FRED VAN DYKEN,

Applicant,

vs.

DISTRICT COURT OF FOURTH
JUDICIAL DISTRICT IN AND FOR
MISSOULA COUNTY, MONTANA,

Respondent.

ORDER DISMISSING APPEAL
AND APPLICATION FOR SUPERVISORY CONTROL

Filed Nov 13 1986

In this cause, coming on regularly for classification under the Internal Operating Rules of this Court, we determine that the appeal of the State of Montana should

be DISMISSED; in like manner, we also DISMISS the application of the defendant, Fred Daniel Van Dyken, for supervisory control.

Van Dyken stands charged with deliberate homicide in the District Court, Fourth Judicial District, Missoula County, Montana. The charge grows out of a shooting death of Missoula County Deputy Sheriff Alan Kimery in Missoula County on December 6, 1984. Van Dyken was tried before a jury in Park County, Montana, in September, 1985, but the jury was unable to reach a verdict, and presiding District Judge declared a mistrial.

The State appealed to this Court, following post-trial denial of motions made in the District Court, and before a second trial, on these issues:

1. Is the State entitled to obtain a psychiatric evaluation of the defendant for use in rebuttal where defendant has or is likely to rely upon the defense of lack of a particular state of mind which is an element of the offense charged?

2. Is the State entitled to have access to defendant's alcohol treatment records for use in cross-examination and rebuttal of defense experts and witnesses who will testify about the effects of alcohol on defendant's ability to hold the requisite mental state?

3. Is the State entitled to present rebuttal testimony by a psychologist who examined the defendant at his request but was not used as a defense witness?

4. Did the District Court err in instructing the jury that deliberate homicide requires proof that the defendant acted "with the knowledge that he was causing or with the purpose to cause the death?"

Following the presentation of the State's appeal to this Court, the defendant Van Dyken filed an application for review and his motion to consolidate his application for review with the appeal of the State. Van Dyken's application for review presents the following issues:

1. Is the State barred from retrying defendant for the offense of deliberate homicide, on the grounds of double jeopardy? Specifically,

(a) Did the first trial jury impliedly acquit defendant of deliberate homicide when it deadlocked in its deliberations between conviction on two lesser included offenses only?

(b) Even if it did not, was the subsequent mistrial declared without manifest necessity, on account of the court's failure to inquire of the jury as to whether it had reached a verdict on the greater offense?

2. Should the defendant's psychiatric expert be able to testify at trial as to defendant's version of the shooting event, when this was one of the primary sources upon which he relied in forming his opinion concerning the defendant's mental state on the night in question, and when he was permitted to testify fully concerning this at the first trial? Specifically,

(a) Is the trial court's ruling precluding this testimony at the second trial in accordance with the Rules of

Evidence, specifically Rules 403, 703, 803(4) and 804(b)(3)?

(b) Irrespective of the question of the inherent correctness or incorrectness of the ruling, does this ruling now place defendant twice in jeopardy, when the defense psychiatrist was permitted to testify to defendant's version of the event without objection at the first trial?

The State's issues arise from Van Dyken's defense at the first trial that he was unable to act "purposely" or "knowingly" in shooting Officer Kimery. The defense is based upon his alleged genetically-based intolerance for alcohol and several personality disorders that, when combined with alcohol intoxication and the stress he had experienced in the months and weeks prior to the shooting, made it impossible for him to hold either of those states of mind. At the first trial, in defense, Van Dyken produced a Dr. Michael Mandel, who testified without objection to the defendant's version of the events as told to the psychiatrist and based on this and other factors determined that because of the genetically-based intolerance for alcohol, he could not have purposely or knowingly committed the crime for which he was charged.

The State contends that when Van Dyken argues that he did not act purposely or knowingly, which is an element of the crime that the State must prove, that his defense really constitutes one of mental disease or defect under our state statutes and that therefore, the court should appoint a psychiatrist to examine the defendant and report to the court.

The District Court denied the State's motion for the examination of the defendant by a psychiatrist chosen by

the State. Van Dyken argues that the ruling was correct because under the facts of this case, there is no statutory authority for such examination by a psychiatrist, that alcoholism is not a "mental disease or defect" and that a compelled psychiatric evaluation will violate defendant's Fifth Amendment rights.

The District Court also denied the State's motion to gain access to records concerning alcohol treatment of Van Dyken, and further denied the State's motion to call a psychologist-consultant by the defense prior to the first trial as the State's witness.

Moreover, the court had given an instruction on finding the elements of deliberate homicide in the first trial, and the State made a post-trial motion for a ruling that in the second trial the instruction would follow one offered by the State. This the District Court also denied.

Van Dyken's application for review contends that his second trial would constitute double jeopardy. He relies on Abney v. U.S. (1977), 431 U.S. 651, 659-662, ___ S.Ct. ___, ___ L.Ed. ___. In this case, following the first trial, a Missoula newspaper announced that at the time the jury was discharged, the vote stood 8 for conviction of mitigated deliberate homicide and 4 for conviction of negligent homicide. However, the jury was not polled by the District Court judge nor was a poll requested by counsel just before the jury was discharged. Van Dyken contends that a hearing should at least be held as to whether there had been in fact an acquittal of the charge of deliberate homicide and that the discharge of the jury occurred "without manifest necessity" which would bar a retrial on the deliberate homicide charge.

Van Dyken also objects to the District Court's post-trial ruling that would preclude the psychiatrist from testifying in the second trial as to the defendant's version of the shooting event and again Van Dyken claims double jeopardy because the psychiatrist was permitted to testify to the defendant's version at the first trial without objection.

Van Dyken defends the instruction given by the District Court in the first trial, claiming that the instruction approved by this Court in State v. Sigler (1984), 688 P.2d 749, 41 St.Rep. 1039, is in error.

Regardless of the importance of the issues presented by the parties, and they do seem important, it is inescapable that such issues now presented are interlocutory and not appealable.

An appeal by the State is permitted under grounds stated in § 46-20-103, MCA. One of the grounds for which an appeal is allowable is the case of the District Court granting an order suppressing evidence. The District Court's refusal to compel the psychiatrist examination of a defendant, or its refusal to permit the deposition of a psychiatrist who had been consulted by the defense are not in themselves orders suppressing evidence, for who knows what that evidence may be? The other issues raised by the State are clearly interlocutory.

In the same manner, the issues raised by Van Dyken in his application for supervisory control relate to interlocutory orders and rulings and as such not properly subject to supervisory control proceedings. Under our holding in State ex rel. Forsyth (Mont. 1985), 701 P.2d 1346, 42 St.Rep. 969, the declaration of a mistrial in the

circumstances here described does not constitute a bar to a second trial on the grounds of former jeopardy.

The other grounds raised by Van Dyken are also interlocutory and as such are available for review on appeal in case defendant is convicted in the second trial. A writ of supervisory control is not granted where the result would be piecemeal litigation of issues. Such a writ is appropriate only when the petitioner has no plain, speedy or adequate remedy at law and when extraordinary and compelling circumstances are presented. State ex rel. Florence-Carlton Consol. Schools District 15 and 6 v. District Court of the First Judicial District (Mont. 1981), 632 P.2d 318, 38 St.Rep. 1204.

ACCORDINGLY,

The appeal of the State of Montana in this cause is DISMISSED, and the application of Van Dyken for a writ of supervisory control is DENIED. The cause is remanded to the District Court for further proceedings.

The Clerk is directed to mail a copy of this Order to all counsel of record.

DATED this 13th day of November, 1986.

/s/ J.A. Turnage
Chief Justice

/s/ Fred J. Weber

/s/ John C. Sheehy

/s/ Frank B. Morrison, Jr.

/s/ L.C. Gulbrandson

/s/ William E. Hunt, Sr.
Justices

APPENDIX C

IN THE SUPREME COURT OF THE
STATE OF MONTANA

No. 86-279

STATE OF MONTANA,

Plaintiff/Appellant,

vs.

FRED DANIEL VAN DYKEN,

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and Cross-Appellant.

STATE ex rel. FRED VAN DYKEN,

Applicant,

vs.

DISTRICT COURT OF FOURTH
JUDICIAL DISTRICT IN AND FOR
MISSOULA COUNTY, MONTANA,

Respondent.

ORDER

Filed Jan 20 1987

Defendant Fred Van Dyken petitioned this Court for rehearing in the above-entitled matter. This Court dismissed his application for a writ of supervisory control on November 15, 1986. In that order, this Court considered the merits of Van Dyken's contention that his second trial would constitute double jeopardy. We rejected his argument under our holding in State ex rel. Forsyth (Mont. 1985), 701 P.2d 1346, 42 St.Rep. 969, holding that the declaration of a mistrial under the circumstances here

described does not constitute a bar to a second trial on the grounds of former jeopardy. In that order, this Court noted that Van Dyken's application was based on a Missoula newspaper article which announced that at the time the jury was discharged, the vote was eight for a conviction of mitigated deliberate homicide and four for conviction of negligent homicide. We also noted that the jury was not polled by the district judge nor was a poll requested by counsel just before the jury was discharged.

The State objects to Van Dyken's petition for rehearing since this Court has considered the claim on its merits. The State also notes, however, that defendant may choose to file a federal habeas corpus petition challenging this Court's determination. The State points out that it may be helpful for this Court to set forth with greater particularity the basis of its decision in this matter, in order to prevent a lengthy and time-consuming referral from the federal district court to this Court to determine the specific findings of fact made by this Court in reaching its conclusion. For that reason, this Court now sets forth with greater particularity the basis for its determination.

The District Court specifically found that the jury was unable to reach a verdict. Therefore, the mistrial was properly declared upon a showing of manifest necessity. Defendant in the instant case objected to further deliberations by the jury when the District Court sent the jury out for further deliberations after it had deliberated for 13½ hours. When the jury returned after another 2 hours of deliberations and indicated that it was unable to reach a verdict, defendant acquiesced in declaration of the mistrial: he did not object to a declaration of the mistrial at

that point; not did he request that the jury be polled to determine whether a verdict had been reached on any of the offenses. Defendant may not argue that such a polling should have taken place. Further, defendant did not request an "acquittal first" instruction to be given. Such an instruction is not constitutionally or statutorily mandated. Defendant has failed to preserve any alleged error.

Finally, defendant did not produce any evidence which supports a finding that the jury impliedly acquitted him of the offense of deliberate homicide. The Missoula newspaper article which he attached as an appendix to his brief is not properly before the Court where it is outside of the record. It is also improper hearsay. Rule 801, M.R.Evid. Finally, it attempts to delve into matters which are protected by Rule 606(b), M.R.Evid. In any event, the article simply provides a basis for *speculating* that had the jury been instructed with an "acquittal first" instruction, there may have been an implied acquittal of the defendant. It does not support a finding of fact that there *was* an acquittal. It is also directly refuted by the juror affidavits which were offered and which demonstrate that the jurors had not reached a unanimous verdict on the offense of deliberate homicide.

The mistrial was properly declared when the District Court found that the jury was unable to reach a verdict. It does not constitute a bar to a second trial on the grounds of former jeopardy. Defendant has failed to present a colorable claim of double jeopardy.

ACCORDINGLY, IT IS ORDERED:

1. The defendant's petition for rehearing in this matter is DENIED. The cause is remanded to the District Court for further proceedings.

2. The Clerk of this Court is directed to mail a copy of this Order to all counsel of record.

DATED this 20th day of January, 1987.

/s/ J.A. Turnage
Chief Justice

/s/ John Conway Harrison

/s/ Fred J. Weber

/s/ John C. Sheehy

/s/ L.C. Gulbrandson

/s/ William E. Hunt, Sr.
Justices

APPENDIX D

Criminal homicide is mitigated deliberate homicide when a homicide which would otherwise be deliberate homicide is committed under the influence of extreme mental or emotional stress for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a reasonable person in the actor's situation.

To convict the Defendant of deliberate homicide, the State must prove the following three elements:

First, that the Defendant performed the acts causing the death of Alan Kimery;

Second, that when the Defendant did so, he acted purposely or knowingly;

Third, that when the Defendant did so, he was not suffering from extreme mental or emotional stress for which there is reasonable explanation or excuse. The State has the burden of proof to exclude mitigation beyond a reasonable doubt.

If you find from your consideration of all the evidence that all three of the elements listed above have been proved beyond a reasonable doubt, then you should find the Defendant guilty of deliberate homicide.

If you find from your consideration of all the evidence that the first two of the above elements have been proved beyond a reasonable doubt, but not the third, then you should find the Defendant guilty of mitigated deliberate homicide.

If you find from your consideration of all the evidence that either of the first two elements has not been proved beyond a reasonable doubt, then you should find the Defendant not guilty of both deliberate homicide and mitigated deliberate homicide.

* * *

APPENDIX E

(p. 1927) FRIDAY, JUNE 26, 1987

(Whereupon, the following proceedings were had and entered of record in open court in the presence of the Defendant and the jury:)

THE COURT: The record should reflect the presence of the Defendant. Mr. Germann, I received a note from you that you have reached a verdict; is that accurate?

JURY FOREMAN: Yes, Your Honor.

THE COURT: Is this a verdict on which all twelve of your number agree?

JURY FOREMAN: Yes, sir, it is.

THE COURT: The procedure now will be for the Clerk to call the roll, and the bailiff will take the verdict from you. She will read it. It may well be that one of the pairs may want to poll; that is, the jurors are asked individually whether you agree or disagree with this verdict. So if the clerk will call the roll –

THE CLERK: Rudolph Goetz?

MR. GOETZ: Guilty.

THE COURT: At this time just say, "here."

THE CLERK: Lloyd Lindstrom?

MR. LINDSTROM: Here.

THE CLERK: Edward Adams?

MR. ADAMS: Here.

THE CLERK: Diane Humphrey?

(p. 1928) MS. HUMPHREY: Here.

THE CLERK: Eileen Richey?

MS. RICHEY: Yes.

THE CLERK: Bruce Darelius?

MR. DARELIUS: Yes.

THE CLERK: Yvonne Moody?

MS. MOODY: Here.

THE CLERK: Thespina Veroulis?

MS. VEROULIS: Here.

THE CLERK: Emma Winebrenner?

MS. WINEBRENNER: Here.

THE CLERK: Steven Germann?

MR. GERMANN: Here.

THE CLERK: Laurie Tobol?

MS. TOBOL: Here.

THE CLERK: Judith Nelson?

MS. NELSON: Here.

THE COURT: Okay, Mr. Brown, please take the verdict and give it to the clerk.

Once more I caution people in the audience to accept this calmly.

THE COURT: To the charge of deliberate homicide, we the jury all of our number find the Defendant Fred

Van Dyken guilty, dated this 26th day of June, 1987, signed Stephen J. Germann, Jury Foreman.

(p. 1929) THE COURT: Do you wish the jury polled?

MS. BORG: Yes, Judge.

THE COURT: What will happen now is the clerk will call the roll of the jury. If you agree with this verdict say, "Yes." If you disagree, say "No."

THE CLERK: Rudolph Goetz?

MR. GOETZ: Yes.

THE CLERK: Lloyd Lindstrom?

MR. LINDSTROM: Yes.

THE CLERK: Edward Adams?

MR. ADAMS: Yes.

THE CLERK: Diane Humphrey?

MS. HUMPHREY: Yes.

THE CLERK: Eileen Richey?

MS. RICHEY: Yes.

THE CLERK: Bruce Darelius?

MR. DARELIUS: Yes.

THE CLERK: Yvonne Moody?

MS. MOODY: Yes.

THE CLERK: Thespina Veroulis?

MS. VEROULIS: Yes.

THE CLERK: Emma Winebrenner?

MS. WINEBRENNER: Yes.

THE CLERK: Steven Germann?

MR. GERMANN: Yes.

THE CLERK: Laurie Tobol?

MS. TOBOL: Yes.

THE CLERK: Judith Nelson?

MS. NELSON: Yes.

THE COURT: Any further polling?

MS. BORG: Not a [sic] behalf of the Defendant, Judge.

THE COURT: Sentencing is set for 9:00 a.m. July 31st. Pre-Sentence will be ordered. No bond will be set pending hearing. The Defendant is remanded to the custody of the Missoula County Sheriff to be held pending sentencing.

I told you earlier how hard this would be. I want to emphasize, because this is [sic] case that obviously attracted public interest, that you're not obligated to discuss this. I have already gone over this once before, but I want to make sure you have complete authority over whether you discuss this or not. You don't have to talk about this with anyone; you can if you want to.

Thank you very much, you're discharged.

(End of proceedings.)

APPENDIX F

James B. Wheelis, District Judge
Department No. 1
Fourth Judicial District
Missoula County Courthouse
Missoula, MT 59802
(406) 543-7612

MONTANA FOURTH JUDICIAL DISTRICT COURT,
MISSOULA COUNTY

STATE OF MONTANA,	*	
Plaintiff,	*	Cause No. 6877
-vs-	*	
FRED DANIEL VAN DYKEN,	*	JUDGMENT
Defendant.	*	SEP 1 1987

* * * * * * * * *

The above-entitled cause came on regularly before the Court on the 11th day of December, 1984, upon the filing of an Information by Robert L. Deschamps III, accusing the Defendant of the crime of DELIBERATE HOMICIDE, a Felony, as specified in Section 45-5-102, M.C.A.

Whereupon the Information and Defendant's Waiver of Preliminary Examination having been filed, and the Defendant being informed of all of his legal rights, he was duly arraigned, answered to his true name and the reading of the Information was waived.

The Defendant was represented by counsel, Margaret Borg, at all stages of these proceedings. Margaret Borg

was assisted at various times by Carol Mitchell, William Boggs and George Corn.

On the 21st day of January, 1985, the Defendant entered a plea of Not Guilty.

Thereafter a jury trial was held on September 9, 1985, wherein the jury could not reach a verdict and a mistrial was declared.

Thereafter a second jury trial was held on June 8, 1987, wherein the jury found the Defendant guilty of the crime of DELIBERATE HOMICIDE, a Felony.

IT IS ADJUDGED AND DECREED that the Defendant is guilty of the offense charged.

A Pre-sentence Investigation Report was ordered and the Court having received and reviewed the report and being fully advised as to the facts of this case;

IT IS THE JUDGMENT OF THE COURT that FRED DANIEL VAN DYKEN be and FRED DANIEL VAN DYKEN is hereby sentenced to life imprisonment in the Montana State Prison at Deer Lodge, Montana.

IT IS FURTHER ORDERED that the Defendant shall pay a fee through the Clerk of the District Court in the amount of Twenty Dollars ($20.00), to go to the County Attorney Surcharge Fund as provided in Section 46-18-236, M.C.A.

Reasons for sentence are:

1. That it was a deliberate act;
2. Defendant's past record;
3. For the protection of society in that the Defendant is a consistently dangerous person;

4. The likelihood of similar acts in the future; and

5. No chance of rehabilitation.

Defendant shall be designated a dangerous offender for the purposes of parole but for the reasons stated above, and because the Court finds that it is necessary for the protection of the public, the said Defendant, FRED DANIEL VAN DYKEN, shall not be eligible for parole and participation in the supervised release program while serving his term.

Defendant shall receive credit for time served at Missoula County Jail, Missoula, in the amount of 997 days.

The Defendant is remanded to the custody of the Missoula County Sheriff for transportation to Montana State Prison in Deer Lodge, Montana, for execution of this sentence and Judgment.

Any bail posted is hereby exonerated.

Done in open Court this 28th day of August, 1987.

DATED this 1st day of September, 1987.

/s/ James B. Wheelis
James B. Wheelis
District Judge

APPENDIX G

IN THE SUPREME COURT OF THE
STATE OF MONTANA

No. 88-038

STATE OF MONTANA,

Plaintiff and Respondent,

-v-

FRED DANIEL VAN DYKEN,

Defendant and Appellant.

RESPONSE TO PETITION FOR REHEARING

Respondent, State of Montana, hereby responds to the petition for rehearing filed herein and respectfully requests that said petition be denied on the ground that it fails to satisfy the requirements of Mont. R. App. P. 34. In pertinent part, Rule 34 provides:

> A petition for rehearing may be presented *upon the following grounds and none other*: That some fact, material to the decision, or some question decisive of the case submitted by counsel, was overlooked by the court, or that the decision is in conflict with an express statute or controlling decision to which the attention of the court was not directed. [Emphasis added.]

Appellant has not shown that the Court overlooked any material fact or issue properly raised on appeal or that its decision conflicts with controlling authority, and accordingly his petition lacks merit.

In support of his petition for rehearing, appellant first asserts that the Court failed to consider whether the jury instruction regarding mental state for deliberate homicide establishes an unconstitutional presumption in violation of *Sandstrom v. Montana*, 442 U.S. 510 (1979). Respondent submits that this argument was waived by virtue of appellant's failure to raise it until the filing of his reply brief, and therefore that the Court correctly refused to consider it.

Rule 23(c), Mont. R. App. P., provides in pertinent part that an appellant's reply brief "must be confined to new matter raised in the brief of the respondent." This Court will not consider on appeal an argument, even one asserting a constitutional challenge, that was not raised either in the appellant's opening brief or in the respondent's brief. *Denend v. Bradford Roofing & Insulation*, 218 Mont. 505, 509-10, 710 P.2d 61, 63-64 (1985).

Here, a plain reading of the appellant's opening brief demonstrates his failure to raise any claim of constitutional error. Appellant's argument was strictly confined to the issue whether specific intent is required to convict a person of deliberate homicide under Montana law. His reference to *Sandstrom* was simply to support his claim that the elements of the offense under Montana law include " 'knowledge that you are causing, or . . . the purpose to cause, the death of that human being.' " Opening Brief of Appellant at 59 (citations omitted). The argument throughout appellant's opening brief was in no uncertain terms an argument that the instruction given by the district court did "not fit with the statutory scheme of Montana." Opening Brief of Appellant at 65. There is only a single oblique reference to the constitutionality of the

jury instruction in appellant's opening brief, and no claim or authority that the instruction created any kind of unlawful presumption. Opening Brief of Appellant at 67. "[B]are reference" to constitutional principles is insufficient to constitute a fair presentation of the issue. *See, e.g., Taylor v. Scully*, 535 F. Supp. 272, 275 (S.D.N.Y. 1982); *Diamond v. Wyrick*, 757 F.2d 192, 193 (8th Cir. 1985).

In response to appellant's argument, the State argued in its brief that the district court's instructions were a correct statement of Montana law as consistently stated by this Court, and that *State v. Sigler*, 210 Mont. 248, 688 P.2d 749 (1984), should not be overturned. Brief of Respondent at 42-43. Appellant then launched into a full-blown constitutional analysis in his reply brief, arguing for the first time that the *Sigler* doctrine incorporates "the very presumption held unconstitutional in *Sandstrom v. Montana*[.]" Reply Brief of Appellant at 19. Properly, this Court rejected the appellant's attempt to interject new issues into the appeal by his reply brief, and reaffirmed its decision in *Sigler. State v. Van Dyken*, No. 88-038, slip op. at 25 (Mont. May 3, 1990).

Accordingly, respondent submits that appellant waived his right to have this Court consider his claim of unconstitutional presumption by failing to raise it until his reply brief, and that this argument presents no legitimate ground for rehearing. Should the Court permit rehearing on this issue, the State respectfully requests an opportunity to brief the merits of the presumption claim.

Appellant's second ground for rehearing is that the Court failed to recognize his argument that the Double

Jeopardy Clause of the United States and Montana Constitutions prohibits the State from changing its strategy at the second trial even if a mistrial is granted out of "manifest necessity." The Court's opinion does not overlook this contention at all. The Court simply acknowledged that "where the first proceeding results in a mistrial, the parties are placed in the same position as if there had been no trial in the first instance." *Van Dyken*, slip op. at 15. Indeed, the Court recognized the indisputable principle that the double jeopardy bar against retrial where the prosecutor precipitates a mistrial in order to strengthen his case is simply inapplicable where a mistrial is declared as the result of a hung jury. *United States v. Gooday*, 714 F.2d 80, 83 (9th Cir. 1983). Appellant's arguments to the contrary were fully considered by the Court and rightfully rejected. He has presented no ground to justify rehearing under Mont. R. App. P. 34.

Appellant having failed to satisfy the criteria for rehearing, respondent requests that the petition for rehearing be denied.

Respectfully submitted this 14 day of May, 1990.

MARC RACICOT
Attorney General
State of Montana
Justice Building
215 North Sanders
Helena MT 59620-1401

By:/s/ Elizabeth S. Baker
Elizabeth S. Baker
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and accurate copy of the foregoing, postage prepaid, by U.S. mail, to the following:

Margaret L. Borg
Office of the Public Defender
317 Woody Street
Missoula MT 59802

William Boggs
P.O. Box 7881
Missoula MT 59807

DATED: MAY 15, 1990 /s/ Gloria J. Davis